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No. 85-2116

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PUERTO RICO,
*Petitioner*,

*v.*

TERRY E. BRANSTAD, AND THE STATE OF IOWA,
RONALD CALDER, INTERVENOR,
*Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR PETITIONER

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## QUESTION PRESENTED

Should the 1861 decision in *Kentucky* v. *Dennison*, which permits a state governor absolute discretion to shelter a fugitive from a sister state in violation of the Extradition Clause, finally be explicitly overruled?

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

## BRIEF FOR PETITIONER

## OPINIONS BELOW

The unreported opinion and order of the District Court for the Southern District of Iowa, denying the Commonwealth of Puerto Rico's application for a writ of mandamus to compel extradition of a fugitive and dismissing the Commonwealth's complaint, is reprinted as Appendix B to the Petition for Certiorari, Pet. App. A10-A15. The opinion of the Court of Appeals affirming that denial, *Commonwealth of Puerto Rico* v. *Branstad*, 787 F.2d 423 (8th Cir. 1986), is reprinted as Appendix A to the Petition for Certiorari, Pet. App. A1-A9.

## JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on March 28, 1986 (see Appendix C to the Petition for Certiorari, Pet. App. A16). That judgment affirmed the judgment of the District Court for the Southern District of Iowa, entered May 21, 1985 (see Appendix B to the Petition for Certiorari, Pet. App. A15). This Court has jurisdiction under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article IV, Section 2, Clause 2 of the Constitution of the United States, the Extradition Clause, provides that:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction over the Crime.

The Extradition Clause is implemented by the Extradition Act, 18 U.S.C. § 3182, which provides that:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate

of any State or Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled, the executive authority of the State, District or Territory to which the person has fled shall cause him to be arrested and secured, and notify the executive authority making such demand, or the agent of such authority appointed to receive the fugitive, and shall cause the fugitive to be delivered to such agent when he shall appear. If no such agent appears within thirty days from the time of the arrest, the prisoner may be discharged.

## STATEMENT OF THE CASE

### A. Introduction

The issue in this case is whether the federal courts must stand idly by while a state governor shelters an accused murderer from justice in the courts of a sister state. Over five years ago in Puerto Rico, Ronald Calder drove his car into a married couple in a grocery store parking lot after arguing and scuffling with them. The husband lived; his eight months pregnant wife and unborn child were killed. Puerto Rico charged Calder with murder and attempted murder. Calder fled to Iowa, where two successive state governors have sheltered him ever since by denying Puerto Rico's request for extradition.

There is no dispute in this case that Puerto Rico's extradition request fully complied with all constitutional and statutory requirements. Nor is there any dispute that the governor of Iowa had a federal constitutional duty to comply with that re-

quest. All that is at issue in this case is whether an ancient decision of this Court frees the governor of Iowa to violate that duty with impunity. For this Court held on the brink of the Civil War that, although a governor is bound by the federal Constitution to extradite a fugitive upon proper request, a federal court cannot command him to do so. *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861). And both the district court and the court of appeals below deemed themselves unable to order the extradition of Calder because they were powerless to overrule *Dennison*. The facts of this case demonstrate why that decision must be overruled by this Court.

## B. The Underlying Crimes Charged in Puerto Rico

The following facts are undisputed.[1] On January 25, 1981, Ronald Calder struck two people with his car in Aguadilla, Puerto Rico. One was Army Villalba De Jesus, a woman eight months pregnant at the time. Pet. App. A17. Both she and her unborn child were killed. *Id.* The other was her husband, Antonio De Jesus Gonzalez, who was injured but not killed. *Id.* Calder was arrested, charged with homicide, and released later the same day. Pet. App. A17-A18.

On February 4, 1981, a judge of the Puerto Rico Superior Court found that probable cause existed to charge Calder with murder and attempted murder. Pet. App. A18; J.A. 14a-17a. He did so only after a preliminary hearing at which he heard sworn testimony from witnesses to the alleged crimes. The witnesses' accounts to the court suggested that the death of Mrs. Villalba De Jesus and injury to her husband were not accidental. The sworn witnesses told the court that Calder had deliberately run the couple down after an argument with Mr.

[1] The mandamus action below was decided on the basis of a stipulated record. The stipulation is reprinted as Appendix D to the Petition for Certiorari, Pet. App. A17-A21.

De Jesus Gonzalez, and had run his car over Mrs. Villalba De Jesus's body repeatedly after she was down. Pet. App. A18. The District Attorney filed informations against Calder for murder and attempted murder on February 27, 1981. Pet. App. A28-A33.

Calder was freed after posting bail, but failed to appear at either of two preliminary hearings scheduled in his case. Pet. App. A18. On April 13, 1981, after a fruitless police search for Calder in and around his home, a second judge of the Superior Court declared Calder a fugitive from justice and issued a warrant for his arrest. Pet. App. A19, A25-A27. Calder was quickly traced by Puerto Rico police to Iowa, and the relevant Iowa authorities notified that he was a fugitive wanted for murder and attempted murder in Puerto Rico. Pet. App. A19; J.A. 18a. Calder surrendered to Iowa authorities but was released upon posting $20,000 bond. Pet. App. A19.

### C. Puerto Rico's Extradition Request

A formal request for Calder's extradition was submitted by Governor Carlos Romero Barcelo of the Commonwealth of Puerto Rico to Governor Robert Ray of Iowa on May 15, 1981. Pet. App. A19, A22-A23. Accompanying the request were copies of the following documents: the order declaring Calder a fugitive and a warrant for his arrest (Pet. App. A25-A27), the informations filed by the district attorney charging Calder with first degree murder and with attempted murder (Pet. App. A28-A33), and three sworn statements by eyewitnesses to the charged crimes (Pet. App. A34-A43). The Governor authenticated the request, affirming that Calder had been charged with crimes under Puerto Rico law, that probable cause had been found by a duly constituted court of the Commonwealth, and that Calder was a fugitive from justice. Pet. App. A22-A23. As Iowa has conceded throughout this case

(*see* Pet. App. A20; J.A. 24a), Governor Romero Barcelo's extradition request was in proper form and met all relevant statutory requirements.

### D. Iowa's "Extradition Hearing"

Notwithstanding the complete absence of controversy about the propriety of Puerto Rico's extradition request, Governor Ray of Iowa ordered that a hearing take place "[i]n order to give the Iowa Governor's Office a full picture of the facts and circumstances surrounding the offense" (J.A. 19a), and appointed his own legal counsel to conduct it. Pet. App. A19; J.A. 20a. That hearing began June 17, 1981.[2] The proceedings were "informal"; the Iowa governor's counsel announced at the outset that "no technical rules of evidence" or "substantial degrees of proof and the like" would apply. J.A. 21a.

No question was raised at the hearing about whether the extradition documents were in order, whether Puerto Rico had in fact charged Calder with crimes, whether Calder was in fact the person wanted in Puerto Rico, or whether Calder was in fact a fugitive. Instead, Calder himself, one of Calder's lawyers, and Calder's companion at the scene of the alleged murder and attempted murder, were each permitted to testify — under direct examination by Calder's lawyer, William Kutmus — about their own personal views of the events of January 25, 1981, and their own personal views of the quality of justice administered in Puerto Rico's courts.

First, one of Calder's lawyers, Mark Pennington, was permitted to testify about his personal view that "a white American man" "could not receive a fair trial in the Commonwealth of

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[2] The extradition hearing was tape-recorded, but only a partial transcript survives, because the State of Iowa destroyed the second of the two tapes. *See* Pet. App. A20; J.A. 55a-56a. The transcript of the first tape, which is itself incomplete and riddled with gaps, is reprinted at J.A. 21a-53a.

Puerto Rico." J.A. 32a. When questioned about the basis for that view, he testified that although he did not speak Spanish, he had had conversations with "anybody that [he] would run across" during a brief visit to Puerto Rico, and that those conversations with unnamed persons had confirmed his view. J.A. 33a-34a.

Next, Calder's companion at the scene of the alleged crimes, Gene Miller, was permitted to report his "personal opinion" that "the whole thing . . . has been blown up out of proportions." J.A. 36a. And Miller was further allowed to testify that a "crowd" had supposedly yelled that "'gringos will not leave the island alive.'" J.A. 41a. Miller claimed to believe this supposed threat notwithstanding his testimony that Puerto Rico had provided both him and Calder with ample protection at every stage of the criminal proceedings. *See* J.A. 37a, 39a. Finally Kutmus was permitted to lead Miller into testifying that there is "an ethnic practice that eminates [*sic*] from the Puerto Ricans against North Americans — whites," and that there is "hostility that exists between [the] two nationalities." J.A. 43a.

Calder himself was next permitted to testify. He was allowed to report rumors he had heard that "witnesses had been bought off" in some cases in Puerto Rico, although he candidly acknowledged that "it may just be hearsay." J.A. 47a. And he was allowed to state his conclusion that "there really didn't look like there was a chance to get a fair trial." J.A. 48a.

Counsel for Puerto Rico present at the hearing repeatedly objected to the form and content of all of this testimony, arguing that it was inadmissible because "self serving" and "based on hearsay" (J.A. 49a), and that it went beyond the scope of matters relevant to extradition. *See* J.A. 38a, 44a, 49a. In keeping with their view that the entire proceeding was invalid, they declined to cross-examine the witnesses. *See* J.A. 34a, 44a. The Iowa governor's representative at the hearing ignored those objections, stating that he was "going to permit

them [i.e., Calder's attorney Kutmus and his witnesses] to go ahead and present this testimony." J.A. 38a.

### E. Iowa's Denial of Puerto Rico's Request

Following the extradition hearing, counsel for Calder and prosecutors in Puerto Rico discussed the possibility of a plea bargain. Pet. App. A20. Puerto Rico prosecutors were willing to consider a plea of guilty to manslaughter with a recommended sentence of probation, and were willing to consider a change of venue if the murder charge were ultimately to go to trial. *See* J.A. 57a. But Puerto Rico conditioned final agreement to a plea upon Calder's voluntary return to Puerto Rico first. Calder refused to comply with that condition. Pet. App. A20; J.A. 57a-58a. Governor Ray attempted to intercede on Calder's behalf by arguing directly with Governor Romero Barcelo. Pet. App. A20.

On December 28, 1981, Governor Ray formally denied Puerto Rico's extradition request, noting his "disappoint[ment]" that Iowa had been unable to persuade Puerto Rico to prosecute Calder's case in the way Iowa saw fit, and chiding Puerto Rico for its "unwillingness to get the criminal charge to something more justifiable." Pet. App. A44-A45. A renewed request for extradition to newly elected Iowa Governor Terry Branstad was likewise denied. Pet. App. A21.

### F. The Proceedings Below

On February 15, 1984, the Commonwealth of Puerto Rico filed a complaint in the United States District Court for the Southern District of Iowa, seeking a writ of mandamus directing the Iowa Governor to grant the extradition demand. J.A. 2a-8a. Puerto Rico claimed that Iowa's denial of extradition violated the Extradition Clause of the federal Constitution, and

the federal Extradition Act, 18 U.S.C. § 3182. J.A. 8a.[3] The district court denied the writ and dismissed the complaint, considering itself bound by this Court's decision in *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861), that even though a Governor's duty to extradite is mandatory under the Constitution, that duty cannot be enforced by a writ of mandamus from a federal court. *See* Pet. App. A12-A14. Acknowledging that the reasoning underlying the holding of *Dennison* was clearly out-of-date, the district court could not "say with certainty that the Supreme Court would overrule *Kentucky* v. *Dennison* if confronted with the mandamus issue today." Pet. App. A14.

The United States Court of Appeals for the Eighth Circuit "[r]eluctantly" affirmed, in an opinion and order issued March 28, 1986. Pet. App. A2. The court concluded that because Puerto Rico's extradition request "met all constitutional requirements," the Iowa Governor was "act[ing] in clear contravention of the Constitution in refusing extradition because he questions the severity of the crime" and was "sitting in judgment on Puerto Rico's actions . . . [and] accusing Puerto Rico of having a sub-standard [system] of criminal justice." Pet. App. A7 & n.7. Nonetheless, the Eighth Circuit felt "constrained" by its "[un]certainty that the Supreme Court would overrule *Dennison* if the same issue were presented to the Court today." Pet. App. A2, A4. In denying relief, the court unanimously concluded: "we cannot emphasize too strongly our deep conviction that the underpinnings of *Dennison* during the past 125 years have been so seriously undermined — especially in view of the mandatory provision of the Extradition Clause of the Constitution — as to suggest reconsideration by the only Court empowered to do so." Pet. App. A9.

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[3] The jurisdiction of the district court was invoked under 28 U.S.C. § 1331. A motion for leave to file complaint had previously been filed with this Court based on its original jurisdiction. This motion was denied on January 9, 1984.

## SUMMARY OF ARGUMENT

As this Court has repeatedly recognized, the Extradition Clause was intended "to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed." *Michigan* v. *Doran*, 439 U.S. 282, 287 (1978), citing *Biddinger* v. *Commissioner of Police*, 245 U.S. 128, 132-33 (1917); *Appleyard* v. *Massachusetts*, 203 U.S. 222, 227 (1906). It was likewise intended to preserve harmony and comity among the states by "preclud[ing] any state from becoming a sanctuary for fugitives from justice of another state and thus 'balkaniz[ing]' the administration of criminal justice among several states." *Michigan* v. *Doran*, 439 U.S. at 287.

The facts of this case reflect the complete frustration of both these purposes. Five years after charges of murder and attempted murder were duly brought against him in Puerto Rico, Ronald Calder remains a fugitive from justice. Iowa has become Calder's "sanctuary" and Puerto Rico, having complied in every detail with all constitutional and statutory requirements for extradition, has been unable to enforce its criminal laws. The quality and integrity of the judicial system of Puerto Rico have been attacked, and judged "sub-standard," by the executive branch of a sister state. The constitutional norms of comity and respect for each state's integrity on which the Extradition Clause is premised have been flagrantly and blatantly violated.

Nonetheless, both the district court and the court of appeals considered themselves bound by this Court's decision well over 100 years ago in *Kentucky* v. *Dennison*, 65 U.S. (24 How.) 66 (1861), that a federal court lacks power to remedy a state governor's clear violation of the Extradition Clause of the Constitution. That holding of *Kentucky* v. *Dennison* plainly frustrates the purposes of the Extradition Clause. It arose in a social context that no longer exists — a nation torn apart over

the institution of slavery — and was based on legal theories of federalism that have long since been abandoned by this Court. Few cases could demonstrate as plainly as this one does why *Dennison* should now be overruled, and the federal courts permitted to curb the limitless discretion that state governors now enjoy to give fugitives a safe asylum in their states.

## ARGUMENT

When the nation's founders decided how our federal system should deal with fugitives from criminal justice, they plainly decided against permitting the states *to* which such fugitives might flee to try them for their crimes. Rather the Framers chose, in the plainest possible constitutional text, to require fugitives to be returned to stand trial in the state *from* which they had fled — that is, the states where they committed the crimes with which they are charged. The Extradition Clause provides that:

> A Person charged in any State with Treason, Felony, or other Crime, who shall flee from Justice, and be found in another State, shall on Demand of the executive Authority of the State from which he fled, be delivered up, to be removed to the State having Jurisdiction over the Crime.

Article IV, Section 2, cl. 2.[4]

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[4] The Extradition Clause was carried over virtually intact from the Articles of Confederation, which likewise had imposed an absolute requirement that fugitives be returned to stand trial in the state where the crime had been committed. *See Kentucky* v. *Dennison*, 65 U.S. at 101-02.

The authority of Congress to implement this provision of the Constitution has long been regarded as beyond question.[5] And Congress has chosen to implement the Extradition Clause by imposing the duty to extradite specifically on the "executive authority" of the asylum state. In the federal Extradition Act, in language virtually unchanged from its original enactment in 1793, *see Michigan* v. *Doran*, 439 U.S. at 287 n.6, Congress has provided that:

> Whenever the executive authority of any State or Territory demands any person as a fugitive from justice, of the executive authority of any State, District or Territory to which such person has fled, and produces a copy of an indictment found or an affidavit made before a magistrate of [the demanding state or territory] charging the person demanded with having committed [a] crime, certified as authentic by the governor . . . [of the demanding state or territory], the executive authority of [the asylum state, district or territory] shall cause him to be arrested and secured, . . . and . . . delivered [to the demanding state or territory].

18 U.S.C. § 3182.

The judgment below permits the asylum state, Iowa, to flout with impunity the plain commands of both the Constitution and federal statute. It does so notwithstanding the perfect compliance of the demanding state, Puerto Rico, with all the constitutional and statutory requirements just quoted.[6] And it does

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[5] *See Michigan* v. *Doran*, 439 U.S. at 287, citing *Innes* v. *Tobin*, 240 U.S. 127, 131 (1916); *Prigg* v. *Pennsylvania*, 41 U.S. (16 Pet.) 539, 617 (1842); *see also Roberts* v. *Reilly*, 116 U.S. 80, 94 (1885), citing *Kentucky* v. *Dennison*, 65 U.S. at 104.

[6] It has never been suggested by any of the parties to this case, or either of the courts below, that Puerto Rico should be treated differently than a state for

so notwithstanding that an accused murderer thereby gains wholesale immunity from trial for his alleged crimes.

The sole support for the judgment below is the ultimate holding of *Kentucky* v. *Dennison*. The body of Chief Justice Taney's opinion for the Court in *Dennison*, which held that

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purposes of the Extradition Clause, or of the federal statute implementing that clause. Such a claim, if raised belatedly now, would be wholly meritless.

To be sure, the Extradition Clause applies on its face only to a "State." But Congress extended both the rights and obligations of extradition to any "State *or* Territory," and it is easy to see why: as this Court has recognized, to fail to do so would have left the territories to serve as convenient havens for fugitives just beyond state boundaries. In *Kopel* v. *Bingham*, 211 U.S. 468 (1909), for example, the Court upheld the obligation of New York's governor to comply with an extradition request by Puerto Rico, stating that "the power to extradite fugitive criminals as between State and Territory is as complete as between one State and another." *Id.* at 474. As the Court continued, "[i]t is impossible to hold that Porto Rico was not intended to have power to reclaim fugitives from its justice," for it was likewise impossible that Puerto Rico "was intended to be created an asylum for fugitives from the United States." *Id.* *Kopel* was recently followed explicitly in a case upholding the extradition of a criminal defendant from Hawaii to the Federated States of Micronesia, which the United States supervises as a trust territory. *See Wolf* v. *Au*, 686 P.2d 16, 22 (Haw. 1984).

True enough, Puerto Rico is today a Commonwealth, and no longer a "Territory." But there can be no reason in logic or policy to suppose that Congress, in implementing the will of the Framers, intended the rights and obligations of extradition to apply to territories but not commonwealths. If anything, Puerto Rico's constitution as a commonwealth in 1952 only enhanced Puerto Rico's status within our federal system: "the purpose of Congress in the 1950 and 1952 legislation was to accord Puerto Rico the degree of autonomy and independence normally associated with States of the Union," *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 594 (1976), while subjecting it like any state to the provisions of the United States Constitution, *see id.* at 593 & n.25. Accordingly, there can be no doubt about Puerto Rico's standing to challenge the judgment below as violative of both the Extradition Clause and the Extradition Act. *Cf. Alfred L. Snapp & Son, Inc.* v. *Puerto Rico*, 458 U.S. 592, 609-10 (1982) (upholding Puerto Rico's standing to bring a parens patriae action to enforce a federal statute reasoning that Puerto Rico's position was "not distinguishable from that of Georgia . . . or from that of Maryland").

the duty of an asylum state governor to extradite upon proper request is absolute, mandatory, and indeed merely "ministerial," 65 U.S. at 107, is of course now well-established law.[7] *Dennison* held in its waning pages, however, that if a governor chooses to violate that duty, as did Governors Ray and Branstad here, the federal government is powerless to do anything about it. *See* 65 U.S. at 109-10. That holding in effect vests state governors with unfettered discretion to refuse to extradite fugitives as they please, undermining both criminal law enforcement and interstate comity in their wake.

## I. *KENTUCKY* v. *DENNISON* SHOULD BE OVERRULED BECAUSE IT UNDERMINES THE EXTRADITION CLAUSE'S GUARANTEE OF EFFICIENT CRIMINAL LAW ENFORCEMENT.

In this case Ronald Calder has found precisely what the nation's founders sought to ensure that fugitives from justice would never find: he has found "in one State an asylum against the processes of justice of another." *Biddinger* v. *Commissioner*, 245 U.S. at 132; *see Lascelles* v. *Georgia*, 148 U.S. 537 (1893). Sheltered in that asylum by the governor of Iowa, Calder has escaped trial in Puerto Rico for the murder and attempted murder with which he is charged. By freeing the governor of Iowa to furnish Calder such asylum, unchecked by the courts below, *Kentucky* v. *Dennison* undermines entirely the concern with criminal law enforcement that is at the core of the Extradition Clause.

The Framers articulated the duty to extradite "in mandatory language" in order "to enable each state to bring offenders to

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[7] *See, e.g., Pacileo* v. *Walker*, 449 U.S. 86, 87-88 (1980) (per curiam); *Michigan* v. *Doran*, 439 U.S. at 288; *Sweeney* v. *Woodall*, 344 U.S. 86, 90 (1952).

trial as swiftly as possible in the state where the alleged offense was committed." *Michigan* v. *Doran*, 439 U.S. at 287.[8] As Chief Justice Taney noted in *Dennison*, the Framers viewed the preservation of law and order in each state as dependent upon the mutual aid mandated by the Extradition Clause: "this was not a compact of peace and comity between separate nations who had no claim on each other for mutual support, but a compact binding them to give aid and assistance to each other in executing their laws, and to support each other in preserving order and law within its confines, whenever such aid was needed and required." 65 U.S. at 100.

In order to preserve the states' ability to maintain "order and law within their respective borders," *id.* at 103, "[i]nterstate extradition was intended to be a summary and mandatory executive proceeding," *Michigan* v. *Doran*, 439 U.S. at 288. The federal Extradition Act, like the constitutional clause it implements, speaks in summary and mandatory language: upon proper request, the governor of an asylum state "*shall* cause [a fugitive] to be arrested and secured," and "*shall* cause [that] fugitive to be delivered." 18 U.S.C. § 3182 (emphasis added). The Uniform Criminal Extradition Act, which has been enacted by forty-eight states, including Iowa, as well as by Puerto Rico and the Virgin Islands, likewise provides that, upon demand, "it is the *duty* of the governor of this state to have arrested and delivered up to the executive authority of any other state of the United States any person charged in that state with treason, felony, or other crime, who

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[8] The value of trying crimes in the community in which they were committed has been stressed by this Court in other contexts. For example, as Chief Justice Burger wrote for the Court in *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555 (1980), local trial helps to generate "public acceptance of both the process and [the] results" of the criminal justice system, *id.* at 569, which in turn prevents criminal law enforcement from falling into the hands of the "victim and the vigilante," *id.* at 571.

has fled from justice and is found in this state." Uniform Criminal Extradition Act, section 2, in 11 Uniform Laws Annot. (West 1974) at 61 (emphasis added).[9]

The Court in *Kentucky* v. *Dennison* itself did not question the absolute and mandatory nature of the duty to extradite upon proper request. Quite the contrary, as Chief Justice Taney wrote for the Court after an exhaustive review of the history and purposes of the Extradition Clause and its implementing statute, the duty of an asylum state governor presented with a proper extradition request is "merely ministerial." 65 U.S. at 107. That governor "has no right to look behind . . . or to question" the criminal charges of the demanding state, "or to look into the character of the crime specified." *Id.*[10] Any such second-guessing, wrote Taney, "would render the clause useless for any practical purpose." *Id.* at 102.

But having deemed such second-guessing a flat violation of constitutional and statutory duty, *Dennison* completely insulated it from federal oversight. For if a governor chose to violate his duty, Chief Justice Taney wrote, neither Congress nor the federal courts could command him to obey it. *See* 65 U.S. at 109-10. *Dennison* thus converted the mandatory duty imposed by the Constitution and federal statute into a wholly discretionary decision of the asylum state's governor.[11]

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[9] The federal and state acts require extradition upon receipt of the forms of documentation provided by Puerto Rico here: "a copy of an indictment found or an affidavit made before a magistrate of any State of Territory, charging the person demanded with having committed treason, felony, or other crime, certified as authentic by the governor or chief magistrate of the State or Territory from whence the person so charged has fled." 18 U.S.C. § 3182; *see also* Uniform Criminal Extradition Act, § 3 (same requirement).

[10] In keeping with this view, the Uniform Criminal Extradition Act expressly forbids inquiry by the asylum state governor into the guilt or innocence of a fugitive whose extradition has been demanded in proper form. Uniform Criminal Extradition Act, § 20, in 11 Uniform Laws Annot. (West 1974) at 270.

[11] Nor is relief from a governor's refusal to extradite likely to be available in an asylum state's forums. In *South Dakota* v. *Brown*, 576 P.2d 473 (1978),

Such unbridled discretion wholly undermines the "first concern" of the Extradition Clause — "securing a prompt and efficient administration of the criminal laws of the several States." *Appleyard* v. *Massachusetts*, 203 U.S. at 227-28. At best, *Dennison's* holding of federal immunity for a recalcitrant governor allows him to defeat the "prompt and efficient" administration of criminal justice. For he may delay extradition as long as he likes while he considers whatever issues he chooses, meanwhile forcing the requesting state to defend the integrity of its processes in the executive branch of another state. At worst, as in this case, *Dennison* permits a recalcitrant governor unilaterally to block the requesting state from enforcing its criminal laws at all. Thus *Kentucky* v. *Dennison*, contrary to the express intent of the Framers, the words of the Constitution, and the legislation of Congress, allows a state to become "a shield for the guilty." *Biddinger* v. *Commissioner*, 245 U.S. at 132-33.

*Kentucky* v. *Dennison* not only is inconsistent with the intent of the Framers, the words they used, and the legislation Congress enacted to implement those words; it is also irreconcilable with recent decisions of this Court protecting the integrity of the states' criminal justice systems. As this Court only recently reiterated in another context, "[t]he right to formulate and enforce penal sanctions is an important aspect of the sovereignty retained by the states." *Kelly* v. *Robinson*, 55 U.S.L.W. 4011, 4014 (U.S. Nov. 12, 1986). In no modern decision by this Court is state criminal law enforcement given as short shrift as it is by *Kentucky* v. *Dennison*.

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for example, the California Supreme Court, relying on *Dennison*, held itself powerless to order Governor Jerry Brown to comply with an extradition request by South Dakota. The fugitive sought was Dennis Banks, a Native American activist who had been convicted in South Dakota of riot while armed with a dangerous weapon and assault with a dangerous weapon with intent to kill.

*First*, this Court has required of federal courts deference to ongoing state criminal proceedings that are brought, as here, in good faith. Had Ronald Calder sought to enjoin the Puerto Rico criminal action in a federal court, he would have been squarely barred by the doctrine of *Younger* v. *Harris*, 401 U.S. 37 (1971); *see Hicks* v. *Miranda*, 422 U.S. 332 (1975); *Huffman* v. *Pursue*, 420 U.S. 592 (1975); *O'Shea* v. *Littleton*, 414 U.S. 488, 499-501 (1974); *see also Rizzo* v. *Goode*, 423 U.S. 362, 380 (1976).[12] This requirement of federal judicial abstention from interference with state criminal proceedings reflects the principle that "[n]o citizen is immune from prosecution, in good faith, for his alleged criminal acts." *Younger* v. *Harris*, 401 U.S. at 46, quoting *Watson* v. *Buck*, 313 U.S. 387, 400 (1941); *Beal* v. *Missouri Pacific R.R.*, 312 U.S. 45, 49 (1941). While *Younger*, to be sure, was animated by concern for comity between the federal government and the states, the Extradition Clause mandates no less comity between state and state. Yet *Kentucky* v. *Dennison* effectively allows criminal defendants to do in a state capitol before state employees what the *Younger* line of cases bars them from doing in a federal court before Article III judges: shut down ongoing state criminal proceedings.

*Second*, this Court has forbidden both state and federal courts from doing in habeas corpus proceedings brought by fugitive criminal defendants precisely what *Dennison* would permit state governors to do: sit in judgment both of the guilt or innocence of the accused and the quality of justice in the demanding state's courts. Had Ronald Calder sought to vent his unfounded fears about Puerto Rico's criminal laws and processes in the state or federal courts of Iowa in a habeas proceeding, he again would have been squarely barred. In

[12] Principles of federal judicial deference to ongoing state proceedings apply with at least equal force to Puerto Rico proceedings. *See, e.g., Fornaris* v. *Ridge Tool Co.*, 400 U.S. 41 (1970); *Romany* v. *Colegio de Abogados*, 742 F.2d 32 (1st Cir. 1984).

*Michigan* v. *Doran*, this Court held that the state courts of an asylum state were forbidden, in a habeas corpus proceeding, from undertaking any inquiry into the basis for the demanding state's finding of probable cause. 439 U.S. at 239. And in *Pacileo* v. *Walker*, this Court held that an asylum state's courts were likewise forbidden on habeas "to conduct an inquiry into the present conditions of the [demanding state's] penal system." 449 U.S. at 88. This holding followed from this Court's earlier imposition of similar limits on a federal court reviewing a fugitive's habeas petition; in *Sweeney* v. *Woodall*, 344 U.S. 86 (1952), this Court held that a fugitive from Alabama was barred from challenging the constitutionality of his confinement in the federal courts of Ohio, the state to which he had fled. *See id.* at 90. *Kentucky* v. *Dennison*, however, invites criminal defendants to make the very same challenges before the governor's employees that they are forbidden from making before state or federal judges.

Underlying both *Younger* and *Doran* is the presumption that criminal defendants may fully and fairly litigate any federal constitutional claims they might have by way of defense in the criminal proceedings of the state in which they are charged. That presumption is fully applicable in this case as well. State courts, this Court has repeatedly stressed, are no less capable than federal courts of protecting federal constitutional rights. *See, e.g., Stone* v. *Powell*, 428 U.S. 465, 493-94 n.35 (1976). And the federal constitutional rights of any criminal defendant are protected as fully in Puerto Rico's courts as in the courts of any state in the union — including Iowa's. *See* p. 24 & nn. 17-18 *infra*.

Against the backdrop of *Younger* and *Doran*, *Kentucky* v. *Dennison* appears as anomaly. For it leaves open a unique escape hatch through which criminal defendants may flee the force of state criminal proceedings. A state criminal defendant may not find refuge in federal court by bringing actions there for injunctive and declaratory relief. Nor, if he flees to another

state, can he find refuge by putting his case or his constitutional claims on trial before a state or federal habeas court. Under *Kentucky* v. *Dennison*, however, that same criminal defendant may find complete and permanent refuge so long as he escapes over the border and into the chambers of a sympathetic state executive. This last hole in the integrity of state criminal proceedings may be patched only by overturning *Dennison*.

## II. *KENTUCKY* v. *DENNISON* SHOULD BE OVERRULED BECAUSE IT DEFEATS THE EXTRADITION CLAUSE'S MANDATE OF INTERSTATE COOPERATION AND RESPECT.

*Kentucky* v. *Dennison* leaves an asylum state governor free to frustrate the Constitution's "concern for . . . comity in extradition," *Michigan* v. *Doran*, 439 U.S. at 296 (Blackmun, J., concurring in result), by allowing him to sit in judgment of the demanding state's courts with absolute impunity. The state court inquiry prohibited in *Michigan* v. *Doran* was a most mild assault on comity when compared to the prior proceedings in this case. The "extradition hearing" conducted here by Governor Ray of Iowa amounted to nothing less than a direct attack on the quality of justice administered by the courts of the Commonwealth of Puerto Rico. Such an attack is an insult to the integrity of Puerto Rico, and invites precisely the sort of interstate friction and retaliation which the Extradition Clause was intended to avoid.

The sole focus of the hearing conducted by the Iowa Governor's employee in this case was the quality of justice afforded by Puerto Rico's judiciary. Hearsay testimony elicited from the fugitive, his companion and his lawyers, grounded in plain self-interest and smacking of racism, attacked the ability of Puerto Rico's courts to impanel impartial juries, protect crimi-

nal defendants, and guard against perjured testimony. The subject of the hearing was not, as in *Michigan* v. *Doran*, the "niceties" of an underlying probable cause determination, but the very ability of the courts of Puerto Rico to try a "white American man" fairly. *See* Statement of the Case, *supra* at pp. 6-8.

Such a procedure violates the most basic precepts of a federal system, and destroys the very "harmony and welfare of the States," *Appleyard* v. *Massachusetts*, 203 U.S. at 228, that the Extradition Clause was intended to promote. If one state can be denied its right to extradition based on a valid request, then it will hardly be surprising if that state denies a similar request when the tables are turned. If one state is free to second-guess another, the other is free to retaliate.

The mandatory command of the Extradition Clause was intended to prevent just such balkanization and interstate friction. *Appleyard* v. *Massachusetts*, 203 U.S. at 228; *Biddinger* v. *Commissioner of Police*, 245 U.S. at 132-33. The Extradition Clause, like the Full Faith and Credit Clause and the interstate Privileges and Immunities Clause, which both also appear in Article IV, and like the interstate Commerce Clause, was part of the Framers' efforts "to help fuse into one nation a collection of independent, sovereign states." *Toomer* v. *Witsell*, 334 U.S. 385, 395 (1948). "The Extradition Clause, like the Commerce Clause, served important national objectives of a newly developing country striving to foster national unity." *Michigan* v. *Doran*, 439 U.S. at 288. The Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." *Baldwin* v. *G.A.F. Seelig*, 294 U.S. 511, 523 (1935). "In the administration of justice, no less than in trade and commerce, national unity was thought to be served by de-emphasizing state lines for certain purposes, without impinging on essential state autonomy." *Michigan* v. *Doran*, 439 U.S. at 288.

Extradition is the sole context in which a decision of this Court has licensed the states to treat each other as hostile foreign sovereigns, in violation of the system of cooperative federalism the Constitution thus commanded. This Court has enforced the requirements of full faith and credit to other state's statutes and judgments, *see, e.g., Milwaukee County* v. *White Co.*, 296 U.S. 268, 275-77 (1935),[13] prohibited interstate discrimination in taxation and the regulation of commerce, *see, e.g., H.P. Hood & Sons, Inc.* v. *Dumond*, 336 U.S. 525, 538-39 (1949); *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978), and precluded states from denying to those from other states the privileges and immunities of citizenship, *see, e.g., Supreme Court of New Hampshire* v. *Piper*, 105 S.Ct. 1272 (1985); *United Building and Construction Trades* v. *City of Camden*, 104 S.Ct. 1020 (1984); *Austin* v. *New Hampshire*, 420 U.S. 656, 660 (1975).[14] *Kentucky* v. *Dennison* invites states who must be at peace over every other aspect of their governance to fight a war of all against all when it comes to extradition.

States have all too often accepted that invitation. Far from being an occasion for "harmony" among the states, extradition requests have all too often, as here, led to discord in interstate relations, retaliation between states, and animosity between their governors.[15] In some, but by no means all of these cases,

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[13] The decisions of the Puerto Rico courts are entitled to full faith and credit just as those of a state's courts are. *See, e.g., Americana of Puerto Rico, Inc.* v. *Kaplus*, 368 F.2d 431 (3d Cir. 1966), *cert. denied*, 386 U.S. 943 (1967).

[14] The Privileges and Immunities Clause is applied to Puerto Rico as if it were a state by the Federal Relations Act, 48 U.S.C. § 737; *see, e.g., Silver* v. *Garcia*, 760 F.2d 33, 36 (1st Cir. 1985).

[15] For example, the refusal by the Governor of New York of a request to extradite a fugitive from Georgia led to a public dispute in which Georgia Governor Richard B. Russell denounced the action as a "deliberate and wanton insult." *See* New York Times, Dec. 23, 1932, p. 7, cols. 1-2; Dec. 28, 1932, p. 36, col. 4. The Governor of New York, attacked as well by Georgia's Con-

the Governor's refusal to extradite may have reflected his fear that the demanding state might violate the civil rights of the fugitive, either because of the absence of procedural protections of due process or, as in *Dennison* itself, because of the nature of its substantive law.[16] Whatever the merit of such explanations in their historical context, they can no longer support the wholesale assault on comity which *Dennison* invites and which the Governor of Iowa in this case perpetrated.

As to procedural protections, the application of the fundamental guarantees of due process to the states ensures defendants in every state the right to a speedy and fair trial by a jury of his peers, with the assistance of counsel and the protections of the fourth, fifth, and sixth amendments. *See, e.g., Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Gideon* v. *Wainwright*, 372 U.S. 335 (1963); *Malloy* v. *Hogan*, 378 U.S. 1 (1964); *Duncan* v. *Louisiana*, 391 U.S. 145 (1968). And federal law now provides both civil and criminal liability for violations of civil

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gressmen, responded by pointing to prior refusals to extradite by other governors, including Russell himself. *Id.* In another request from Georgia, Massachusetts Governor Hurley's refusal to extradite led to a long-standing personal feud with Georgia Governor Rivers, who retaliated by paroling a prisoner on the condition that the prisoner go directly to Massachusetts. *See* New York Times, Sept. 2, 1937, p. 8, cols. 4-5; Sept. 3, 1937, p. 6, col. 6. *See generally* Note, *Interstate Rendition: Executive Practices and the Effects of Discretion*, 66 Yale L. J. 97, 110-111 & n.74 (1956). For a more recent example of the controversy and friction produced by a Governor's refusal to extradite, *see South Dakota* v. *Brown*, 576 P.2d 473, 483 (Cal. 1978) (Mosk, J., dissenting) (calling California Governor Jerry Brown's refusal to extradite radical native American activist Dennis Banks, convicted in South Dakota of riot and assault with a deadly weapon, "a contemptuous rebuff to the administration of justice in a sister state and a blow to cooperative law enforcement among states.").

[16] *Dennison* itself involved a refusal by a free state to extradite a fugitive to a slave state. In *Dennison*, Ohio, the asylum state, had not claimed a right to total discretion to refuse to extradite, but only the authority to refuse to extradite where the offense charged in the demanding state was not an offense under the law of the asylum state. *See* 65 U.S. (24 How.) at 69 (opinion of Ohio Attorney General).

rights by state officials. *See, e.g., Screws* v. *United States*, 325 U.S. 91 (1945); *Monroe* v. *Pape*, 365 U.S. 167 (1961); *Monell* v. *Department of Social Services*, 436 U.S. 658 (1978). *See generally* Murphy, Revising Domestic Extradition Law, 131 U. Penn. L. Rev. 1063, 1074-76 (1983) (arguing that to the extent governors' refusals to extradite were intended to protect civil rights, that need has been substantially reduced by the emergence of new legal doctrines applicable in every state).

There has been no claim here, nor could there be, that these federal constitutional protections do not bind the courts of Puerto Rico. The criminal due process rights of all persons in Puerto Rico are protected by the Federal Constitution to the same extent as in any state of the Union. *See Rodriguez* v. *Popular Democratic Party*, 457 U.S. 1, 7-8 (1982) (due process and equal protection as well as all other fundamental guarantees of the United States Constitution apply to Puerto Rico); *Torres* v. *Puerto Rico*, 442 U.S. 465, 469-71 (1979) (due process, equal protection and the constitutional requirements of the fourth amendment apply to the Commonwealth of Puerto Rico).[17] Moreover, the Bill of Rights of the Commonwealth Constitution, adopted by the people of Puerto Rico in 1952 and approved by Congress, 66 Stat. 327, 48 U.S.C. § 731(c), incorporates all of the guarantees included in the Bill of Rights of the Federal Constitution that are applicable to states.[18]

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[17] Puerto Rico is also a state for the purposes of 42 U.S.C. § 1983, and the United States District Court for the District of Puerto Rico has jurisdiction under 28 U.S.C. § 1343(3) to redress the deprivation of rights secured by the Federal Constitution or federal civil rights statutes. *Examining Board* v. *Flores de Otero*, 426 U.S. 572, 580-97 (1976).

[18] *See* Constitution of the Commonwealth of Puerto Rico, Art. II, sections 1-20, L.P.R.A. vol. 1 (1982). The only exception to full incorporation is trial by jury for misdemeanors; and even as to this exception, the Puerto Rico Rules

As to substantive criminal law, the Constitution likewise imposes on each state — and on the Commonwealth of Puerto Rico — some basic federal standards for the imposition of punishment. *See, e.g., Robinson* v. *California*, 370 U.S. 660 (1962); *Solem* v. *Helm*, 463 U.S. 277 (1983). And the controversy that gave rise to *Kentucky* v. *Dennison* — the deep division among the states over the issue of slavery — has been resolved for all states by the adoption of the thirteenth and fourteenth amendments to the Constitution.

There has never been any claim by Iowa in this case, nor could there be, that Puerto Rico's criminalization of murder and attempted murder in any sense differs from the substantive criminal law of Iowa. Murder and attempted murder do not involve any activity as to which there are deep and fundamental differences between Iowa and Puerto Rico: murder and attempted murder are universally condemned as crimes. The only substantive difference revealed by the facts of this case, if it can even be termed that, relates to nothing more than a dispute over the timing of plea negotiations that might reduce the charge of murder to manslaughter or vehicular homicide —

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of Criminal Procedure provide for jury trial not only in felony cases but also in serious misdemeanor cases where a sentence of 6 months or more may be imposed, as required by this Court for state criminal trials, *see Duncan* v. *Louisiana*, 391 U.S. 145 (1948); *Baldwin* v. *New York* 399 U.S. 66 (1970); *Apodaca* v. *Oregon*, 406 U.S. 404 (1972). *See* 34 L.P.R.A. App. II R. 111. The substantive and procedural criminal laws of Puerto Rico are similar to those existing in most of the states of the Union. See Puerto Rico Penal Code of 1975, 33 L.P.R.A. 3021 to 4628 (1983) and Puerto Rico Rules of Criminal Procedure, 34 L.P.R.A. App. II, R. 1 to 254 (1971). Puerto Rico's judicial system has been described as "an example to be emulated and a model to be followed." Clark and Rogers, *The New Judiciary Act of Puerto Rico: A Definitive Court Reorganization*, 61 Yale L.J. 1147 (1952). *See also* Trias Monge, El Sistema Judicial de Puerto Rico 112-234 (1978); Negron Garcia, *Puerto Rico Updates its Courts*, 58 J. Am. Jud. Soc. 350 (1975).

precisely the sort of issue as to which a demanding state is entitled to deference and respect.[19]

Rather, the only claim here is that of Mr. Calder and his witnesses that the courts of Puerto Rico cannot be trusted to enforce fairly their own laws and to protect his constitutional rights. It is nothing more or less than an attack on the integrity of Puerto Rico's courts. Such an attack is a blatant violation of the Extradition Clause, and of "our constitutional system of cooperative federalism," *Nevada* v. *Hall*, 440 U.S. 410, 424 n.24 (1979).

If Ronald Calder has any defenses to offer, he can present them and litigate them in the courts of the Commonwealth of Puerto Rico, fully protected by the guarantees of the United States Constitution. *See Stone* v. *Powell*, 428 U.S. at 493-94 n.35. And if Ronald Calder wishes to engage in plea negotiations, he should do so with the prosecutors of Puerto Rico according to the Commonwealth's procedures. "[I]n delivering up an accused person to the authorities of a sister State they [the officials of the asylum state] are not sending him for trial to an

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[19] If a case should ever arise in which a demanding state and an asylum state were to differ over their substantive criminal law in the way that Ohio and Kentucky did in *Dennison*, then far less drastic and less offensive means than the wholesale discretion afforded by *Kentucky* v. *Dennison* might be devised to resolve them. In enforcing the Full Faith and Credit Clause, for example, this Court has held in limited circumstances that a state need not apply the statutory law of another state where to do so would be "obnoxious" to substantial substantive policies of the forum state. *See Pacific Employees Insurance Co.* v. *Industrial Accident Comm'n*, 306 U.S. 493, 502-04 (1939); *Nevada* v. *Hall*, 440 U.S. 410, 422-24 (1979). It is far from clear, however, that even in a case of genuine differences over substantive law, an exception like that carved out in the full faith and credit context should apply in the extradition context. As the Court was careful to point out in *Nevada* v. *Hall*, the mandatory command of the Extradition Clause places a "specific limitation" on the freedom of the states to treat each other as "unfriendly sovereigns." *Id.* at 425 ("Nor are the States free to deny extradition of a fugitive when a proper demand is made by the executive of another state.").

alien jurisdiction, with laws which our standards might condemn, but are simply returning him to be tried, still under the protection of the Federal Constitution but in the manner provided by the State against the laws of which it is charged he has offended." *Biddinger* v. *Commissioner of Police*, 245 U.S. at 133. As the Court of Appeals recognized in this case, the Governor of Iowa, in refusing extradition of Ronald Calder, was "sitting in judgment of Puerto Rico's actions . . . [and] accusing Puerto Rico of having a sub-standard system of criminal justice." Pet. App. A7 n.7. *Kentucky* v. *Dennison*, which invites precisely such accusations and then immunizes them from review or remedy, should be overruled.

## III. *KENTUCKY* v. *DENNISON* SHOULD BE OVERRULED BECAUSE IT CONFINES FEDERAL JUDICIAL POWER WITHIN LIMITS LONG ABANDONED BY THIS COURT.

*Kentucky* v. *Dennison* ultimately held, as noted above, that although a state governor's duty to extradite is mandatory and merely ministerial, the federal government cannot compel him to perform it. This holding viewed federal power over the states and state officials as exceedingly limited. But as this Court has explicitly recognized, *Dennison*'s view of the limits of federal power is a "19th-century view." *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982). And as this Court has likewise acknowledged, the "language and analysis of the *Dennison* case of the preceding century" has been "clearly cut back," to the point where it "is not representative of the law today." *Id.* at 762-63. Indeed, the 20th-century decisions of this court have thoroughly repudiated that 19th-century view, leaving *Kentucky* v. *Dennison* to stand as a lone historical relic.

Chief Justice Taney's ruling in *Dennison* was grounded in a now antiquated theory of dual federalism that viewed states and state officials as generally enjoying significant immunity from federal governmental power. But Taney's declaration of federal judicial impotence in relation to the states had special poignancy in the particular circumstances under which *Kentucky* v. *Dennison* was decided — namely, the secession of the Southern states from the Union on the eve of the Civil War.

The fugitive in *Dennison*, Willie Lago, was wanted in Kentucky for aiding a slave in escaping from her owner. Dennison, the Governor of Ohio, a free state, refused to extradite him. An original action was brought in the United States Supreme Court. At the time the case was argued, February 1861, "the states of the Deep South had already proclaimed their secession from the Union, their representatives in Congress had said their farewells, and other states and representatives were about to go." C. Swisher, *History of the Supreme Court of the United States, Vol. V: The Taney Period (1863-64)*, at 688 (1974). At that troubled moment in our nation's history, a federal judicial order to the governor of Ohio to return Lago to Kentucky would have been at best an idle gesture; at worst, fuel for further divisiveness. As one noted commentary has observed, there was at that moment quite clearly "an element of unrealism in considering coercion of the states, or of their governors, by the hands of the federal judiciary." *Id.*

In light of Taney's powerful and well-documented conclusion in *Dennison* that the Ohio governor was flagrantly violating his constitutional duty, the denial of relief in the final pages of the *Dennison* opinion is perhaps best understood as a device for averting a showdown and preserving legitimacy for the Court in a moment of extreme national crisis. *See, e.g.*, B. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789-1888*, at 247 n.70 (1985) (arguing that in *Dennison*, the Court was "lying low" after the debacle of its

earlier activism in *Dred Scott* v. *Sandford*). The ground asserted for that denial of relief, however, was an extreme view of the limits of federal power with respect to the states that has no contemporary analogue in any other decision of this Court: "[T]he Federal Government, under the Constitution," Taney wrote, "has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it; for if it possessed this power it might overload the officer with duties which would fill up all his time, and disable him from performing his obligations to the State, and might impose on him duties of a character incompatible with the rank and dignity to which he was elevated by the State." 65 U.S. at 107-08.

Chief Justice Taney's view of federal power has been thoroughly rejected by this Court throughout this century. *First*, the insistence that states must in all circumstances be viewed as coequal sovereigns with the federal government — the "dual federalism" approach that characterized the Taney Court's approach in *Dennison*, as in *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857), and *New York* v. *Miln*, 36 U.S. (11 Pet.) 102 (1837) — was firmly laid to rest by the decisions of this Court upholding congressional legislation enacted during the New Deal. *See, e.g., Wickard* v. *Filburn*, 317 U.S. 111 (1942); *United States* v. *Darby*, 312 U.S. 100 (1941); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *NLRB* v. *Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937).

*Second*, ever since this Court's decision in *Ex Parte Young*, 209 U.S. 123, 159-60 (1908), the federal courts have assumed the obligation and the responsibility to order state officials to comply with the mandates of the Constitution. In rejecting the claim of the state attorney general to eleventh amendment immunity in *Ex Parte Young*, the Court held that sovereign immunity could not be invoked to shield unconstitutional state action from federal judicial scrutiny: "[The] use of the name

of the State to enforce an unconstitutional act . . . is a proceeding without . . . authority . . . which does not affect the State in its sovereign or governmental capacity. It is simply an illegal act upon the part of a state official in attempting to use the name of the State to enforce a legislative enactment which is void because unconstitutional." *Id.* at 159.

In the decades since *Ex Parte Young*, this Court has, time and time again, upheld the authority of federal courts to order local officials to comply with the Constitution, notwithstanding local opposition. *See, e.g., Brown* v. *Board of Education I*, 347 U.S. 483 (1954); *Brown* v. *Board of Education II*, 349 U.S. 294 (1955); *Cooper* v. *Aaron*, 358 U.S. 1 (1958). Claims that such decisions excessively burden the exercise of local functions have been rejected. The Court has repeatedly reaffirmed that federal courts may, if necessary, require local officials "to exercise the power that is theirs to levy taxes to raise funds" adequate to remedy constitutional violations. *Griffin* v. *County School Board*, 377 U.S. 218, 233 (1964); *see Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *Milliken* v. *Bradley II*, 433 U.S. 267 (1977). It has directed federal courts to order local officials to reorganize state legislative bodies, *see Reynolds* v. *Sims*, 377 U.S. 533 (1964); *Toombs* v. *Fortson*, 241 F.Supp. 65 (N.D. Ga.) (per curiam), *aff'd mem.*, 384 U.S. 210 (1966), and restructure local governmental units, *Hadley* v. *Junior College District*, 397 U.S. 50 (1970), to meet constitutional requirements. In each of these areas, the Court has plainly done precisely what Chief Justice Taney wrote in *Dennison* was beyond the federal government's power: it has ordered state officers to conduct their business and perform their duties consistent with the federal Constitution.

*Third*, this Court has rejected more recent claims that states enjoy some special immunity to even valid exercises of federal power inherent in the structure of the Constitution and the

rights reserved under the Tenth Amendment. To be sure, such claims did have brief ascendancy before this Court. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976). But even during that period the Court limited such claims to a narrow sphere of "traditional governmental functions," and continued to uphold even some federal statutes that ordered state officials to consider federal standards and to follow federally imposed procedures, as did the utility regulation act upheld in *FERC* v. *Mississippi*, 456 U.S. 742 (1982).[20]

Such claims were in any event rejected altogether in *Garcia* v. *San Antonio Metropolitan Transit Authority*, 105 S.Ct. 1005 (1985). In that case, this Court overruled *National League of Cities* and rejected specifically the claim of a local transit authority to immunity from federally imposed minimum wage and pay provisions. In the process, this Court not only overruled prior efforts to limit federal power under the Commerce Clause by isolating the "traditional governmental functions" of states, but also concluded that the structure of the federal government itself was the means chosen by the Framers to secure the role of states. *Id.* at 1016-20. That conclusion repudiated the very rationale for *Dennison* — the fear that absent the restraints of dual federalism, federal power might be used to "overload" the state officer with duties, to "disable him from performing his obligations," to impose duties beneath his "rank and dignity," 65 U.S. at 107-08. This Court has

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[20] The state's argument in *FERC* relied explicitly on Chief Justice Taney's language in *Kentucky* v. *Dennison*. Characterizing that approach as a "rigid and isolated statement" from a "well-known slavery case" which "is not representative of the law today," the Court emphasized the many instances "where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." 456 U.S. at 762, citing *Fry* v. *United States*, 421 U.S. 542 (1975); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Assn.*, 443 U.S. 658 (1979); *Testa* v. *Katt*, 330 U.S. 386, 393 (1947).

recognized instead that state sovereign interests "are more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." 105 S.Ct. at 1018.

What Puerto Rico seeks to uphold in this case is if anything a more modest proposition about federal power than those this Court has already accepted in cases like *Brown* v. *Board* and *Garcia*. For ordering a state governor to perform the "ministerial" duty of extraditing a fugitive involves no interference with detailed matters of discretionary state policy, as might a court order that state officials restructure their schools or electoral districts, or a federal statute telling states what to pay their employees or how to regulate their utilities.[21]

Nor is ordering a state governor to extradite merely a reinforcement of the supremacy of federal *statute;* it is a mandate squarely drawn from the plainest text of the Constitution itself. Thus however the limits that state sovereignty imposes on Congressional power are ultimately defined, *see Garcia* v. *San Antonio Metropolitan Transit Authority,* 105 S.Ct. at 1015-20; *id.* at 1038 (O'Connor, J., dissenting), they must surely permit, and indeed require, the exercise of federal power to compel extradition. For far from intruding on any state sovereignty arguably protected by the tenth amendment, federal power here is essential to ensure obedience to mandatory commands of the Constitution that are intended to protect the sovereignty of each state, and the ability of each to bring to trial those who violate its criminal laws.

The constitutional duty of the governor of Iowa to deliver Ronald Calder up to the Commonwealth of Puerto Rico is

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[21] *Cf. Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137, 166-68 (1803) (dictum) (noting that issuance of a writ of mandamus ordering a federal executive officer to perform the ministerial duty of delivering a commission was not foreclosed to a federal court as a "political" matter).

absolute and unconditional. The Extradition Clause and his solemn oath to uphold the Constitution require him to fulfill that duty. His refusal "flies in the face of the fact that States of the Union constitute a Nation," and "disregards the purpose and effect of Article VI of the Constitution." *Testa* v. *Katt*, 388 U.S. 386, 389 (1947). The holding in *Dennison* that no federal power exists to compel the governor of Iowa to obey that duty not only is contrary to the Supremacy Clause, but in effect reads the Extradition Clause right out of the Constitution. Such self-imposed judicial impotence is irreconcilable with our constitutional structure.

## CONCLUSION

*Dennison* shields every refusal to extradite from judicial scrutiny — no matter how arbitrary, how insulting to a state's intregrity, how offensive to norms of comity, or how racist that refusal may be. It precludes the federal courts, and this Court, from serving as the needed referee in such disputes between the states, and from ensuring that the Framers' purpose in including the Extradition Clause — that no state become an asylum for fugitives from justice — is served. Until *Dennison* is overruled, Ronald Calder, properly charged with murder five years ago, can refuse to answer those charges with impunity, having found an asylum in Iowa, and there is absolutely nothing that Puerto Rico can do to bring him to trial.

The court of appeals affirmed the denial of mandamus relief below with the greatest reluctance. Speaking for a unanimous court, Judge Timbers wrote:

> Despite our firm belief in the proper role of the inferior federal courts in adhering to and not seeking to avoid controlling Supreme Court precedent, we cannot empha-

> size too strongly our deep conviction that the underpinnings of *Dennison* during the past 125 years have been so seriously undermined — especially in view of the mandatory provision of the extradition clause of the Constitution — as to suggest reconsideration by the only Court empowered to do so. Perhaps the extradition principles articulated in *Dennison* are in that category so aptly described by Judge Cardozo as being infused with "the doubts and misgivings, the hopes and fears, [all] part of the travail of mind, the pangs of death and the pangs of birth, in which principles that have served their day expire, and new principles are born."

Pet. App. A10. Petitioner Commonwealth of Puerto Rico respectfully urges this Court, "the only Court empowered to do so," to overrule *Kentucky* v. *Dennison*, and to reverse the judgment below in order that the governor of Iowa may be compelled to perform his plain constitutional duty.

Respectfully submitted,

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